93-175

No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

GEORGE L. MOTHERSHED,
Petitioner,

v.

CARROLL E. GREGG,

and

GARY L. BROOKS,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the dictum in *Bulloch v. United States*, 763 F.2d 1115 (10th Cir. 1985 Ut.), *cert. denied*, 474 U.S. 1086 (1986) addresses the very narowly construed issue of *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250, *rehearing denied* 322 U.S. 1281, 88 L.Ed 1596 (1944), and all other Circuit Courts having ruled upon the involvement, participation, implication, and/or causation of an attorney or other officer of the court in perjury, misrepresentation of fact, fabrication of evidence or other dishonest conduct in obtaining a judgment is fraud practiced upon the court and upon subsequent discovery is grounds to vacate a judgment without regard to time.

Whether an attorney, as member or other officer of the court, has, at all times, a continuing duty of loyalty, honesty, candor and integrity to the court and because he is a party to an action, he perpetrates fraud upon the court when he has been a participant, involved, implicated, and/or the cause of perjury, misrepresentation of fact, fabrication of evidence or other dishonest conduct in obtaining a judgment he has practiced fraud upon the court with as much certainly as an attorney so acting in a representative capacity, and that such a judgment should be vacated.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, George L. Mothershed petitions for a Writ of Certiorari to review the Order and Judgment of the United States Court of Appeals for the Tenth Circuit entered in this matter on May 11, 1993.

OPINIONS BELOW RELEVANT TO THIS ACTION

The United States District Court for the Western District of Oklahoma's Order, which was a judgment entered September 28, 1989 (App., *infra* 10a). On May 20, 1991, filed in the trial court Petitioner's Motion to Vacate on grounds the trial court's Order (App., *infra,* 10a) was

obtained by fraud practiced on the court through attorney-party's perjured testimony which was denied by Order. *Mothershed v. Gregg, et al,* (W.D.Okla. January 17, 1992, CIV-88-1504-W [unreported]) (App., *infra,* 5a-9a). Said District Court Order was affirmed on appeal by Order and Judgment of the United States Court of Appeals for the Tenth Circuit. *Mothershed v. Gregg, et al,* (May 11, 1993, 92-6035 [unreported]) (App., *infra,* 1a-4a).

JURISDICTION

A Petition for Writ of Certiorari is due August 9, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

RULE INVOLVED

Fed.R.Civ.P. 60. Relief from Judgment or Order (b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud. etc. On Motion and upon such terms that are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. The rule does not limit the

power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually notified as provided in Title 28, U.S.C. Sec. 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, auditia querela, and bills of review, are abolished, the procedure for obtaining any relief from a judgment shall be by motion as prescribed by these rules or by an independent action.

STATEMENT OF FACTS

Summarizing facts as stated in Opening Brief for Appellant (OBFA), filed in the Appellate Court on March 12, 1992, this appeal is from an order denying Petitioner's Fed.R.Civ.P. 60(b) motion to vacate a judgment entered in the trial court on September 28, 1989 (App., *infra,* 10a) without regard to time of said judgment's entry, on grounds fraud practiced upon the trial court by an attorney-party's participation in obtaining a judgment (App., *infra,* 10a) through his giving perjured testimony upon central issues.

Petitioner was being represented by Respondent-attorneys in a divorce action. Petitioner owned a certain oil and gas lease, had a note to a certain bank and the bank had an indicia of a mortgage upon said oil and gas lease. The bank was owned by a former in-law of Petitioner. Respondents represented to Petitioner that a certain oil and gas lease owned by Petitioner was "in jeopardy of being lost" to a certain bank and was "in dire consequences of being lost in foreclosure without significant long term litigation . . ." the said oil and gas lease will be of doubtful or no value unless the Petitioner would act timely to defend the foreclosure and assign said oil and gas lease to Respondents.

In reliance to the Respondents representations of fact on April 19, 1983, Petitioner entered into a certain transaction with Respondents. Subsequently, Petitioner dis-

covered from his examination of records of said bank that said oil and gas lease had never been in jeopardy of being lost to said bank and consequently, had not been of doubtful or no value. Petitioner had entered into said transaction with Respondents based upon their false and untrue representations and inducements to Petitioner's detriment. As a result of entering into said transaction with Respondents, Petitioner lost a valuable oil and gas lease and its income.

Respondents at all times had maintained their representations and inducements to Petitioner were based upon verbal communications and/or contact with officers and directors of said bank. Respondent Brooks testified upon three occasions of the verbal communications with officers and/or directors of the bank: at pre-trial deposition; at trial; and at a post-trial hearing. In a pre-trial deposition, an attorney, Respondent, Gary L. Brooks (DOC. 33, p. 31, line 16) testified the bank "had a mortgage on it (said oil and gas lease) and were going to—and intended to foreclose it to satisfy their debt (from Petitioner)"; (DOC. 33, p. 31, line 16) "And the bank was going to foreclose on it (said oil and gas lease) and sold it on the open market at that time, it would not have paid off the note, in my opinion." (see also OBFA 20-22).

The second time, on September 13, 1989, participating in the trial court in his testimony, attorney-Respondent, Gary L. Brooks, again stated said oil and gas lease was in jeopardy of being lost to said bank because Petitioner "was in default" on his note and mortgage on said lease. Brooks' testimony was, prior to April 19, 1983, the date of entering into said Trust Revocation and Trust Agreement by the parties, the threat was made from a bank officer named "Ken", with the bank's attorney, also, being present. The alleged meeting was testified to have been on either or all of the following days, on Tuesday, April 5, 1983, Wednesday, April 6, 1983, and/or on Thursday, April 7, 1983. (DOCS. 124, Ex. 2, p. 1, 2, 31-47).

His post-trial testimony, April 19, 1990, said attorney-Respondent, Brooks testified for the third time that said lease was in jeopardy of being lost by foreclosure to said bank (DOC. 124, Ex. 3, p. 93-98 see also OBFA p. 22-25).

After trial and the entry of the trial judgment (App., *infra*, 10a) Petitioner discovered the representations and inducements of Respondents causing Petitioner into entering into the April 19, 1983, agreement with Respondents to be false, untrue and fraudulent. But, also, to bolster his fraudulent April 19, 1983, transaction, Respondent Brooks had given false, and untrue testimony on three separate occasions. One of the occasions of his perjured testimony resulted in the trial court judgment (App., *infra*, 10a).

Affidavits which were obtained after trial from non-resident Respondents' witnesses, who were at pertinent periods of time, officers and/or directors of said bank, stated none of them at any time prior to April 19, 1983, had any communication and/or contact with any party to this action, including, Respondent, Gary L. Brooks (DOC. 124, Ex. 4, para. 2, 3, 4, a bank executive vice-president, and Ex. 6, para. 5, a bank director and DOC. 134, Ex. 8, para. 4, 5, 6, bank attorney and Ex. 11, para. 6, 7, 8 bank president).

Without the occurrence of, either, a communication or a contact by said bank officers and/or directors with any of the parties herein, prior to April 19, 1983, (DOC. 124, Ex. 4, para. 2, 3, 4, a bank executive vice-president, and Ex. 6, para. 5, a bank director and DOC. 134. Ex. 8, para. 4, 5, 6, bank attorney and Ex. 11, para. 6, 7, 8 bank president) it may be inferred from their statements, that it is not possible for, either, any of the material representation of fact and inducements contained in said Trust Revocation and Trust Agreement, dated April 19, 1983, or the testimony of Respondent, Gary L. Brooks, an attorney, on material issues on three separate

occasions to have been true facts. Respondents representations and inducements were false and untrue, and, also, served as the basis for their April 19, 1983, fraudulent transaction with Petitioner. The testimony given by Respondent Brooks concerning his contact and/or communications with said bank officers and/or directors was perjured on all occasions.

Also, the affidavits of said non-resident witnesses, the bank officers (DOC. 124, Ex. 5, para. 6, a bank executive vice-president, and Ex. 6, para. 6, a bank director and DOC. 134, Ex. 8, para. 6, 7, 9 bank attorney and Ex. 11, para. 9 bank president) and another of Respondents' listed witnesses (DOC. 134. Ex. 6, para. 6) and affidavit of Gerald E. Durbin, II, contained in the Bill of Cost (DOC. dated 9-29-89, Exs. A, B, C) evidence the Respondent, Gary L. Brooks', attorneys had no previous contact with any of the twenty-five (25) non-party witnesses they had listed in witness lists filed with the trial court (DOCS. 54, 67, 89) prior to the attorneys filing all trial court pleadings, motions, or other documents. It may be inferred that none of the pleadings, motions, or other documents were based upon any pre-filing investigation being conducted to have obtained or established facts sufficient to allow the Respondents to have defended this action in the trial court in objective good faith. With no pre-filing investigation having been conducted by Respondent's attorneys, none of the pleadings, motions, or other documents filed in the trial court could have been well grounded in fact or supported by substantial evidence. It can only be concluded the Respondent's pleadings, motions, or other documents filed in the trial court were all sham, factually groundless, mock, factually wrong, spurious, and/or false.

Had Respondent Gary L. Brooks' attorneys conducted a Fed.R.Civ.P. 11 mandated pre-filing inquiry of the witnesses which they subsequently listed [Witness Lists in Status Report (DOC. 54, Exhibit C); Defendants

Final Witness List (DOC. 67) and Defendants' Final Pre-Trial Order (DOC. 89)] as Defendants' Witnesses in Court documents and after such an inquiry prepared a factually correct Answer, e.g. truthful admissions or denials to the Complaint and Amended Complaints, this action would have been concluded after Respondents' Answers (DOC. 42, 43), were filed.

Therefore, the filing of each pleading, motion, or other document constituted a separate misrepresentations of fact and/or a deceit practiced upon the trial court by Respondent Brooks' attorneys. The attorneys, thereby, assisted, allowed and suborned the perjury of their client in the trial court.

A. Trial Court Proceedings

Petitioner filed a trial court complaint (DOC. 1) on August 30, 1988, in a diversity of citizenship action. His claims arise from, principally, inter-party fraud, giving rise to equitable cancellation of a certain Partial Assignment of an Oil and Gas Lease; equitable cancellation of a certain Trust Revocation and Trust Agreement, dated April 19, 1983, claim; an accounting claim; an 18 U.S.C. Secs. 1961 et seq. (Racketeering Influenced and Corrupt Organization Act [RICO]) claim; and attorneys' deceit and collusion claim giving rise to 21 Okla.St.An. Sec. 575 damages. After trial judgment was entered for Respondents on September 28, 1989. (App., *infra,* 10a). The judgment (App., *infra,* 10a) was appealed on other grounds to the Tenth Circuit which was later affirmed by the Tenth Circuit.

Upon the subsequent discovery that the September 28, 1989, judgment (App., *infra,* 10a) had been obtained through perjured testimony of Respondent, Brooks, on May 20, 1991, Petitioner filed a Motion to Vacate (DOC. 124) in the trial court. And, later he filed Supplemental Facts in Support of the Motion to Vacate. (DOC. 134). Both were filed with supporting affidavits from Respond-

ents' non-resident witness, who were unavailable at trial. Respondents did not file any affidavits in opposition or otherwise respond to said affidavits. The District Court denied Respondent's motion on January 17, 1992. (App., *infra,* 5a-9a).

In the trial court's Order, January 17, 1992, (App., *infra,* 8a, first para., 3rd sent.) "Having carefully and completely examined the transcript of the trial proceedings in this case, the Court is not persuaded nor convinced that defendant (Brooks) committed perjury as alleged by plaintiff." There is no reference in the Order (App., *infra,* 5a-9a) to any of the affidavits of Appellee's non-resident witnesses, partial transcripts of testimony of appellee-defendant Brooks, or Trust Revocation and Trust Agreement of April 19, 1983, which are contained in the Motion to Vacate (DOC. 124, Exs. 1, 3, 4, 5, 6, 7, 8, 9) and/or Supplemental Facts (DOC. 134, Exs. 10, 11). It is concluded, commenting only on the transcript of trial proceedings and lacking any reference to the other relevant evidence, the trial court did even not consider said Trust Revocation and Trust Agreement, other partial transcripts of Appellee Brooks' testimony and the affidavits of his non-resident witness. Without the trial court considering said relevant evidence, neither, Respondent Brooks' fraudulent representations and inducements causing Petitioner to enter into said April 19, 1983, agreement, nor the three separate occasions of his perjured testimony on a material issues was not and could not have been found by the trial court in its Order, January 17, 1992 (App., *infra,* 5a-9a).

Additionally, in the trial court's Order, January 17, 1992 (App., *infra* 8a, first para., 3rd sent.) "Having carefully and completely examined the transcript of the trial proceedings in this case, the Court is not persuaded nor convinced that defendant (Brooks) committed perjury as alleged by plaintiff." There is no reference in the

Order (App., *infra,* 5a-9a) to any other relevant evidence. It is concluded, commenting only on the transcript of trial proceedings and lacking any reference to said the other relevant evidence, the trial court did even not consider any documents which are contained in the Motion to Vacate (DOC. 124, Exs. 1, 3, 4, 5, 6, 7, 8, 9); Supplemental Facts (DOC. 134, Exs. 10, 11) and/or affidavit of Gerald E. Durbin, II, annexed to the Bill of Cost (DOC. dated 9-29-89, Exs. A, B, C) all evidence Respondent, Garry L. Brooks', attorneys had no contact or communication with any of the twenty-five (25) non-party witnesses.

Petitioners' attorneys had listed said non-resident witness in Witness Lists filed with the trial court (DOCS. 54, 67, 89). Without the trial court considering the affidavits of non-resident witnesses contained in the Motion to Vacate (DOC 124, Exs. 5, 6, 7, 8, 9) and Supplemental Facts (DOC. 134, Exs. 10, 11), and/or affidavit of Gerald E. Durbin, II, annexed to the Bill of Cost, the trial court did not and could not have found in its Order, January 17, 1992 (App., *infra,* 5a-9a) Respondent Brooks' attorneys complete failure to conduct any pre-filing investigation of any of the twenty-five (25) non-party witnesses, which they had listed in witness lists filed with the trial court (DOCS. 54, 67, 89), prior their filing all pleadings, motions, or other documents.

Also, without the trial court considering the non-resident witnesses' affidavits contained in the Motion to Vacate (DOC. 124, Exs. 5, 6, 7, 8, 9) and Supplemental Facts (DOC. 134, Exs. 10, 11), Respondent Brooks' attorneys misconduct in assisting and suborning the perjury of Brooks on a material issue resulting in the fraudulently begotten judgment (App., *infra,* 10a) was not and could not have been found by the trial court in its Order, January 17, 1992. (App., *infra,* 5a-9a).

B. Appellate Court Proceedings

The Appellate Court entered its Judgment and Order (App., *infra,* 1a-4a) and, also, issued its Mandate, both, on May 11, 1993. In said Judgment and Order the appellate court made, only, findings of fact concerning Respondent Gregg, unsupported by the record on appeal. There exists no reference whatsoever to Respondent Brooks, in the United States Circuit Court of Appeals for the Tenth Circuit's May 11, 1993, Judgment and Order. (App., *infra,* 1a-4a).

After August 30, 1989, Respondent Carroll E. Gregg (Gregg), pro se, had not participated in any of the trial court filings, proceedings, hearings, and/or at trial of the issues and at no time did he participate in the Appellate Court. Therefore, the findings of fact and conclusion of law, only, referring to Respondent Gregg and contained in the Tenth Circuit Court's May 11, 1993, Judgment and Order (App., *infra,* 1a-4a) are factually incorrect findings.

Perjured testimony of an attorney, Respondent Brooks, was the conduct giving rise to Petitioner's for, both, the trial court and the appellate court grounds to vacate the trial court's September 28, 1989, judgment (App., *infra,* 10a) as fraud practiced upon the trial court. Further the complete failure of the Respondent's attorneys to conduct pre-filing inquiry prior to filing pleadings, motions and other document in the trial court thereby assisting and suborning their client's perjury is a separate ground to vacate the judgment (App., *infra,* 10a) as fraud on the court.

REASONS FOR GRANTING THE PETITION

I. THE RULE OF LAW OF THE SUPREME COURT AND OTHER CIRCUITS THAT AN ATTORNEY'S PARTICIPATION IN PERJURED TESTIMONY IS GROUNDS FOR VACATING A JUDGMENT GREATER THAN ONE YEAR AFTER ITS ENTRY, DIRECTLY CONFLICTS WITH THE RULE IN THE TENTH CIRCUIT

The Tenth Circuit's Order and Judgment (App., *infra,* 1a-4a) affirms its rule of law that directly conflicts with the rule of law of the Supreme Court and other Circuit Courts. Pursuant to the Tenth Circuit's rule of law, where an attorney found to have participated in after discovered perjury is never a ground for fraud on the court which a court will vacate the prevailing party's judgment entered greater than one year. *Bulloch v. United States,* 763 F.2d 1115 (10th Cir. 1985), *cert. denied,* 474 U.S. 1086 (1986) is cited as the controlling authority for the Tenth Circuit rule in its Order and Judgment (App., *infra,* 1a-4a) affirming the trial court's refusal to vacate the trial court's judgment of September 28, 1989. (App., *infra,* 10a). The Tenth Circuit in dictum *Bulloch v. United States, supra,* 1121, and in its Order and Judgment (App., *infra,* 1a-4a) has held perjury, generally, is never a ground for reversing a judgment on grounds for fraud on the court, greater than one year after its entry. It would logically follow the Tenth Circuit's rule of law an attorney's suborning of perjury would, also, be neither such a ground for vacating a judgment on grounds of fraud on the court. Facts in *id.,* 1120, involved a situation of alleged fraud on the court was the withholding of evidence during pre-trial discovery.

In contradiction with the conclusion of the Tenth Circuit, facts in a decision in this Court ruling on a denial of a Fed. R. Civ. P. 60(b) motion to vacate, greater than after one year after its entry, which had sought

relief on grounds of fraud on the court which was obtained through perjured testimony and a spurious document is *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245, 64 S.Ct. 997, 88 L.Ed. 1250, 61 U.S.P.Q. 241, *rehearing denied*, 322 U.S. 1281, 88 L.Ed. 1596 (1944).

There is a line of decisions in two other Circuit Courts where perjury by party witnesses is recognized as grounds for fraud on the court allowing a judgment to be vacated beyond one year after its entry *Lim Kowoc Soon v. Brownell*, 369 F.2d 808 (5th Cir. 1966), *Dausuel v. Dausuel*, 90 App. D.C. 275, 195 F.2d 774 (D.C. Cir. 1952).

Since the power to vacate a judgment for fraud on the court is so great, and is free from procedural limitations, it is important to know the kind of conduct falls in this category. A number of courts and a distinguished commentator have construed very narrowly, only to have been found when the participation, involvement, implication and/or cause was by an attorney or other officer of the court *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. at 245, 64 S.Ct. at 1001; *Re Intermagnetics America, Inc.*, 926 F.2d 912, 916 (9th Cir. 1991), [a member of the court, an officer of a debtor in possession in bankruptcy, had perjured himself]; *Great Coastal Express, Inc. v. International Bhd. of Teamsters, Chauffeurs, Warehousemen, & Helpers*, 675 F.2d 1349, 1357 (4th Cir. 1982), *cert. denied*, 459 U.S. 1128 (1983) (an attorney's perjury); *Serzysko v. Chase Manhattan Bank*, 461 F.2d 699, 702 (2nd Cir.) (attorney's perjury), (per curiam), *cert. denied*, 490 U.S. 883, 93 S.Ct. 173, 34 L.Ed. 2d 139 (1972); *H. K. Porter Co. v. Goodyear Tire and Rubber Co.*, 536 F.2d 1115, 1119 (6th Cir. 1976) (dishonest conduct of an attorney is fraud on the court); *Kupferman v. Consolidated Research & Manufacturing Corp.*, 459 F.2d 1072, 1078 (2nd Cir. 1972) (dishonest conduct of an attorney); *Kenner v.*

Commissioner, 387 F.2d 689, 691 (7th Cir. 1968) (dishonest conduct of an attorney), *certiorari denied,* 393 U.S. 841, 89 S.Ct. 121, 12 L.Ed.2d 112; *Martina Theatre Corp. v. Schine Chain Theatres, Inc.,* 278 F.2d 798, 801 (2nd Cir. 1960); *Lockwood v. Bowles,* 46 F.R.D. 625, 631 (D.C.D.C. 1969) (officers of the court need to be involved in perjury for fraud on the court to be found); *Toscano v. Commissioner,* 441 F.2d 930, 934 (9th Cir. 1971) (an attorney's misrepresentation of material fact to the court is fraud on the court); *Travelers Indem. Co. v. Gore,* 761 F.2d 1549, 1551 (11th Cir. 1985) (attorney involvement required for fraud on the court); *S.E.C. v. ESM Group, Inc.,* 835 F.2d 270, 274 (attorney's misconduct required for fraud on the court), *reh. denied,* 840 F.2d 25 (11th Cir.), *cert. denied,* 100 U.S. 1055, 108 S.Ct. 2822, 100 L.Ed.2d 923 (1988); *Porcelli v. Joseph Schlitz Brewing Co.,* 78 F.R.D. 499, 501 (E.D. Wis.) (participation of an attorney required for fraud on the court) *aff'd without opinion,* 588 F.2d 838 (7th Cir. 1978); and 7 Moore's Federal Practice, 1992-93 ed., Para. 60.33, at p. 60-360, in obtaining the perjured testimony or other misrepresentation of fact on a material issue to the court is "fraud on the court", and that fraud is "perpetrated by officers of the court".

Perjured testmony of an attorney or other member of the court on a material issue is a basis of fraud on the court which is a ground to vacate a judgment entered greater than one year from its entry in all jurisdictions addressing this issue, except the Tenth Circuit. The conflict is thus with this Court as well as other circuits. The above decisions the Supreme Court and other circuits, impose a duty upon a court to vacate a judgment entered greater than one year for fraud on the court on grounds practiced by prevailing party's attorneys participation, involvement, implication, or cause in perjury, misrepresentation of fact, fabrication of evidence, or other dishonest conduct in obtaining the judgment, are all irreconcilable

with the Tenth Circuit's dictum in *Bulloch v. United States, supra* (1986).

Where attorneys or other officers of the court have participated, implicated, involved or otherwise have caused perjury, misrepresentation of fact, fabrication of evidence, or other dishonest conduct, which results in obtaining a judgment are examples found by courts as the most egregious conduct involving the corruption of the judicial process to be termed as fraud on the court. Upon the subsequent discovery, courts will grant relief from such judgments, regardless the passage of time. Courts demand from an attorney, as an officer of the court, loyalty, honesty, candor, and integrity in all his dealings with the court. When an attorney, or other officer of the court, departs from that standard of conduct, he perpetrates fraud on the court. 7 Moore's Federal Practice, 1992-93 ed., Para. 60.33, page 60-357 through 60-359.

In the above entitled appeal, the Respondent Brooks, who is an attorney who perjured himself on three separate occasions, is not exempt from his duty of loyalty, honesty, candor, and integrity in all his dealings with the court. He is at all times an officer of the court and must not depart from those professional standards of conduct when he is a party to an action. At attorney, who is a party to a proceeding, and commits perjury, misrepresentation of fact, fabrication of evidence or other dishonest conduct which results in a judgment commits fraud on the court. Perjury of a witness-attorney or a party-attorney is a fraud on the court in the action, with equal certainty as his being a participant, involved, implicated or otherwise caused the perjury in a representative capacity. Whether in capacity as a representative, or in capacity as a witness, in capacity as a party the impermissible conduct of perjury by an atorney is a fraud directed to the judicial machinery itself and is greater than inter-party fraud. "It is a fraud where the court is corrupted or influenced or influence is attempted or where a judge

has not performed his function—thus the impartial functions of the court has been corrupted." *Bulloch v. United States,* 721 F.2d 713, 718 (10th Cir. 1983), *cert. denied,* 106 U.S. 1086, 474 S.Ct. 682, 88 L.Ed.2d 900.

The perjury of Respondent Brooks, as an officer or member of the court, was directed to the judicial machinery. His perjury was a fraud on the court because the judgment of September 29, 1989 (App., *infra,* 10a), was influenced or at the very least influence was attempted on the trial court. The perjury by an officer of the court or a member of the court, Respondent Brooks, is an occasion when the trial court could not perform its proper function, i.e. the court could not make decisions based upon true, honest, and/or candid testimony—thus the function of the trial court's impartial function was corrupted by his perjured testimony.

The Tenth Circuit's rule of law in *Bulloch v. United States, supra* (1986), defies well established law. It also nullifies the effect of *Hazel-Atlas Glass Co. v. Hartford-Empire Co.,* 322 U.S. at 245 n.3, 64 S.Ct. 1001 n.3, which deny the benefits of award of a judgements obtained through an attorney's participation in misrepresentation of material facts to the court, either, with perjured testimony, spurious document, or both.

Bulloch, supra (1986), should not stand as the rule law for the Tenth Circuit on this important issue. This Court should settle the conflict with the Supreme Court and the other seven Circuit Courts over an attorneys participation in perjury as fraud on the court sufficient to vacate a judgment, without regard to time is irreconcilable with the Tenth Circuit's view that perjury is never a ground for vacating such a judgment.

The above appealed action is not a simple case of a witness, who, on the basis of after discovered evidence, is guilty of perjury. This is a carefully planned and carefully executed scheme to defraud the trial court, not only with perjury of Respondent, Brooks, but with assistance

of his attorneys and his co-defendant, Gregg, Respondent herein. The Respondent Gregg and the three attorneys for Respondent, Brooks did not consult, communicate or have any contact with any of the twenty-five (25) witnesses they had listed prior to filing any pleading, motion or other document with the trial court. By that failure to conduct such Fed.R.Civ.P. 11 mandated pre-filing inquiry and filing the spurious documents with the trial court, the attorneys of Respondent Brooks provided, permitted or enabled him to access the trial court for to commit perjury. The Respondent Gregg and the three attorneys for Respondent, Brooks either knew or should have known Brooks would commit perjury on each of the three occasions. The proof of the scheme to defraud the trial court is its complete success up to date, is conclusive *Hazel Atlas,* 322 U.S. at 245-246, 64 S.Ct. at 1001.

"The public welfare demands that the agencies of public justice be not so impotent that they must always be helpless victims of deception and fraud." *Hazel Atlas, supra,* 246. *Id.,* 247-248, "The question, then, is not whether relief can be granted . . . ." It is a judicially devised remedy fashioned to relieve hardships which, from time to time, arise from a hard and fast adherence to another court made rule, the general rule that judgments should not be disturbed after the term of their entry. Created to avert the evils of archaic rigidity, this equatable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations."

II. WHERE A JUDGMENT HAS BEEN OBTAINED THROUGH AN ATTORNEY'S PARTICIPATION IN FRAUD ON THE COURT, THAT COURT HAS A POWER AND DUTY TO VACATE THE SAME

The power to vacate a judgment that has been obtained by fraud upon the court is an inherent power of courts *Universal Oil Products Co. v. Root Refining Co.,* 328 U.S. 575, 580, 66 S.Ct. 1176, 1179, 90 L.Ed. 1447 (1946). The policy of finality of judgment yields to this inherent power *Toscano v. Commissioner, supra,* 934; *Kenner v. Commissioner of Internal Revenue Service,* 378 F.2d 689, 691 (7th Cir. 1968), *certiorari denied,* 393 U.S. 841, 89 S.Ct. 21 L.Ed.2d 112 (1968). There is neither a time limit on setting a judgment to set aside a fraudulently begotten judgment nor can laches bar the Court's consideration of the matter *Hazel-Atlas Glass Co. v. Hartford-Empire Co.,* 322 U.S. at 246, 64 S.Ct. at 1001. When fraud is found to have been practiced upon the court, the judgment should be vacated and the guilty party denied all relief *Hazel-Atlas Glass Co. v. Hartford-Empire Co.,* 322 U.S. at 250-251, 64 S.Ct. at 1003-1004. *Id.,* 249-250, "We hold, therefore, that the Circuit Court on the record here presented had both the duty and the power to vacate its own judgment and to give the District Court appropriate directions."

This Court should exercise its duty and inherent equitable power reverse the Appellate Court judgment entered on May 11, 1993 (App., *infra,* 1a-4a), the trial court order (App., *infra,* 10a) and to vacate judgment (App., *infra,* 5a-9a) on grounds that said judgment was procured through fraud practiced upon the trial court with the perjured testimony of Respondent Brooks and/or with participation or involvement of his attorneys misrepresentation of fact in their filing of sham, spurious, and factually false pleadings, motions and other documents with the trial court.

CONCLUSION

This Court should overrule the dictum in *Bulloch v. United States*, 763 F.2d 1115, (10th Cir. 1985), *cert. denied*, 474 U.S. 1086 (1986), which literally states perjury is never a ground for fraud on the court beyond one year, for vacating a fraudulently begotten judgment. Even when there was participation, involvement, or causation of the perjury or other misrepresentation of fact by an attorney or other officer of the court in having obtained the judgment.

RELIEF SOUGHT

WHEREFORE premises considered, this Court should grant Petitioner a writ of certiorari. It should reverse the Appellate Court judgment entered on May 11, 1993 (App., *infra*, 1a-4a); reverse the trial court Order, January 17, 1991 (App., *infra*, 5a-9a); and vacate with directions the trail court Order, September 28, 1989 (App., *infra*, 10a) on grounds of fraud practiced upon the trial court upon the narrowly construed issue of *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250, 61 U.SPQ 241, *rehearing denied*, 322 US. 1281, 88 L.Ed. 1596 (1944), where involvement, participation, implication, and/or causation of an attorney or other officer of the court in perjury, misrepresentation of fact, fabrication of evidence or other dishonest conduct in obtaining a judgment is fraud practiced upon the court and upon subsequent discovery is ground to vacate a judgment without regard to time. An attorney, as an officer and member of the court, has a continuing duty of loyalty, honesty, candor and integrity to the court and because he is a party to an action, he perpetrates fraud upon the court when he has been a participant, involved, implicated, and/or the cause of perjury, misrepresentation of fact, fabrication of evidence or other dishonest conduct in obtaining a judgment he has practiced fraud upon the court as certainly as an attorney so acting in a representative capacity.

Since the power to vacate a judgment on grounds of fraud on the court is so great and free from procedural limitations, this Court should exercise its duty and inherent equitable power ordering and directing the Tenth Circuit Court to further order the District Court as follows:

Enter an order striking all denials contained in Respondents Answers and Amended Answers filed in the District Court as the denials are factually groundless, sham and/or spurious. The facts alleged in Petitioners' District Court Complaint and Amended Complaint for the purposes of the action should be treated as admitted for all purposes;

Respondents did not oppose Petitioner's Application and Memorandum in Support of Writ of Ne Exeat and Affidavit of George L. Mothershed, Appellant in Support of Motion for Writ of Ne Exeat filed in the Tenth Circuit on March 2, 1993. Said Affidavit, also, contains an unopposed statement of damages, for which said damages should be treated as admitted for all purposes;

Petitioner should be awarded and granted complete relief on all his claims. Which claims arise from, principally, inter-party fraud practiced upon Petitioner by Respondents, which give rise to equitable cancellation of a certain Partial Assignment of an Oil and Gas Lease claim; equitable cancellation of a certain Trust Revocation and Trust Agreement, dated April 19, 1983, claim; an accounting claim, the amount damages for said accounting claim Respondents have confessed by reason of their not having opposed the Affidavit of George L. Mothershed, Appellant in Support of Motion for Writ of Ne Exeat filed in the Tenth Circuit on March 2, 1993; a 18 U.S.C. Secs. 1961 et seq. (Racketeering Influenced and Corrupt Organization Act [RICO]) claim; and attorneys' deceit and collusion claim giving rise to 21 Okla.St.An. Sec. 575 damages;

Further, pursuant to this Court's inherent equitable power impose sanctions against Carroll E. Gregg, pro se;

attorneys of record for Respondent, Gary L. Brooks; and for Respondent, Gary L. Brooks for District Court misconduct and, additionally, impose joint and several liability upon Respondents and their District Court attorneys of record for practicing fraud upon that court and award Petitioner, an additional sum of damages for attorneys' deceit and collusion practiced upon the District Court pursuant to 21 Okla.St.An. Sec. 575;

Additionally, impose joint and several liability upon Respondents and their District Court attorneys of record in awarding Petitioner pre-judgment interests and costs;

To avoid the failure of justice and to avoid further delay of justice the trial court should be directed by this Court to enter an order granting the Petitioner the specific relief as prayed for in the Appellate Court in his unopposed Application for a Writ of Ne Exeat to Respondent Brooks, filed therein on March 2, 1993;

And for such other relief as is equitable, just, reasonable and necessary in the circumstances.

Respectfully submitted,

GEORGE L. MOTHERSHED
Petitioner
10820 North 36th Street
Phoenix, Arizona 85028
(602) 494-0687

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 92-6035

(D.C. No. CIV-88-1504-W)
(W.D. Okla.)

GEORGE L. MOTHERSHED,
Plaintiff-Appellant,

v.

CARROLL E. GREGG, GARY L. BROOKS,
Defendants-Appellees.

ORDER AND JUDGMENT *

[Filed May 11, 1993]

Before MOORE and BRORBY, Circuit Judges, and VAN BEBBER,** District Judge.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

** Honorable G. Thomas Van Bebber, District Judge, United States District Court for the District of Kansas, sitting by designation.

would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff George L. Mothershed appeals from the district court's denial of his motion to vacate judgment, filed pursuant to Fed. R. Civ. P. 60(b). The judgment in question was entered on September 28, 1989, following the district court's grant of a directed verdict in defendants' favor. This court affirmed the judgment on appeal. *See Mothershed v. Southwestern Bank & Trust Co.,* Nos. 89-6144, 89-6314 (10th Cir. Jan. 30, 1991) (unpublished decision).

Mr. Mothershed maintains the district court abused its discretion in denying his motion. *See Campbell v. Bartlett,* 975 F.2d 1569, 1580 n.15 (10th Cir. 1992) (this court normally reviews denial of Rule 60(b) motion for abuse of discretion). He contends that Mr. Gregg committed perjury during the civil trial which lead to the 1989 judgment. He asserts the perjury was so egregious that it requires the judgment be vacated. Defendant Gregg contends that this appeal is frivolous, and that sanctions are appropriate under Fed. R. App. P. 38.

We have carefully reviewed the record on appeal, as well as the parties' briefs and the district court's order. We agree with the district court that the perjury which Mr. Mothershed has described does not rise to the level of a fraud on the court so as to bring his claims within the savings clause of Rule 60(b). *See Hazel-Atlas Glass Co. v. Hartford-Empire Co.,* 322 U.S. 238, 245 (1944); *Bulloch v. United States,* 763 F.2d 1115, 1121 (10th Cir. 1985), *cert. denied,* 474 U.S. 1086 (1986). Consequently, for the reasons stated in the district court's order, the judgment is affirmed.

This leads us to the issue of Mr. Gregg's request for sanctions. Fed. R. App. P. 38 authorizes this court to

award damages if we determine that an appeal is frivolous or brought for the purpose of delay. *Braley v. Campbell,* 832 F.2d 1504, 1510 (10th Cir. 1987). An appeal is frivolous when " 'the result is obvious, or the appellant's arguments of error are wholly without merit.' " *Id.* (quoting *Taylor v. Sentry Life Ins. Co.,* 729 F.2d 652, 656 (9th Cir. 1984) (citation omitted)).

At the time Mr. Mothershed filed this appeal, it was absolutely clear that the perjury which he describes, even if true, would not constitute fraud on the court as that term has been judicially interpreted. *See Hazel,* 322 U.S. at 245-46; *Bulloch,* 763 F.2d at 1121; *see also Great Coastal Express, Inc. v. International Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers,* 675 F.2d 1349, 1356 (4th Cir. 1982) (courts agree that fraud on the court should be construed very narrowly when applied, as here, under the savings clause of Rule 60), *cert. denied,* 459 U.S. 1128 (1983). Minimal legal research makes that abundantly clear.

In addition, Mr. Mothershed has not cited any authority which stands for the proposition that he, as a non-prevailing party to the judgment, was entitled to an evidentiary hearing in the district court prior to the court's consideration of the Rule 60 motion. Finally, there is nothing in the record to show the district court abused is discretion in staying discovery. It is apparent Mr. Mothershed simply wants to relitigate the issues decided in the 1989 lawsut. Under these circumstances, allowing him to do so would severly undermine the integrity of the final judgment rule. *See Bulloch,* 763 F.2d at 1121 (unless party shows fraud on the court through clear and convincing evidence, judgment should not be disturbed).

We agree with Mr. Gregg that sanctions pursuant to Fed. R. App. P. 38 are appropriate. We award as just damages the sum of $1,500 plus single costs. Mr. Mothershed shall make payment within sixty days of the date of this order and judgment. Mr. Mothershed's mo-

tion to correct his brief is GRANTED. His motion to expedite this appeal and his application for writ of Ne Exeat are DENIED as moot. The judgment of the United States District Court for the Western District of Oklahoma is AFFIRMED.

The mandate shall issue forthwith.

Entered for the Court

WADE BRORBY
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-88-1504-W

GEORGE L. MOTHERSHED,
Plaintiff,

vs.

CARROLL E. GREGG and GARY L. BROOKS,
Defendants.

ORDER

[Filed Jan. 17, 1992]

This matter comes before the Court upon the motion of the plaintiff, George Mothershed, pursuant to Rule 60(b), Fed. R. Civ. P., to vacate the judgment entered herein on September 28, 1989, upon a verdict directed by the Court in favor of the defendants, Carroll E. Gregg and Gary L. Brooks. In his motion, the plaintiff contends that the judgment, affirmed by the Court of Appeals for the Tenth Circuit, was obtained by "fraud upon the court." Specifically, the plaintiff alleges that the defendant, Gary L. Brooks, committed perjury on an issue central to the case. The defendant, Gary L. Brooks, has responded to plaintiff's motion, and upon consideration of the parties' submissions, the Court makes its determination.[1]

Rule 60(b) sets the forth specific grounds upon which a party may be relieved from operation of a judgment.

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[1] **The defendant, Carroll E. Gregg, has not responded to the plaintiff's motion. The Court, however,, declines to deem the motion confessed as to this defendant. As explained *infra.*, the Court concludes that the motion is without merit.**

Rule 60(b)(3) specifically permits a court to relieve a party from a final judgment on the grounds of "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." *See,* Rule 60(b)(3), Fed. R. Civ. P. However, in order to be relieved from judgment under Rule 60 (b)(3), the party must file his motion within one year after entry of the judgment. *Id.* As previously stated, judgment, in the instant case, was entered in 1989. The plaintiff's motion was not filed until 1991. Consequently, the plaintiff may not seek relief from the final judgment entered in the instant case under Rule 60(b)(3). *See, Travelers Indem. Co. v. Gore,* 761 F.2d 1549, 1551 (11th Cir. 1985).[2]

Rule 60(b) also recognizes the Court's inherent power to grant relief from a final judgment when fraud has been perpetrated upon it. The savings clause of Rule 60(b) states:

> "This rule does not limit the power of a court . . . to set aside a judgment for fraud upon the court."

Unlike a motion under Rule 60(b)(3), a motion for fraud upon the court under the savings clause is not bound by a one-year limitation for filing. *See,* 7 *Moore's Federal Practice* § 60.33 at 355 (1991). In fact, a successful party may be relieved from a judgment procured through fraud upon the court even though the movant has been guilty of laches. *See, Hazel-Atlas Glass Co. v. Hartford-Empire Co.,* 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944). Because of the absence of a rigid time limitation and the "deep-rooted federal policy preserving the finality of judgments," the concept of "fraud upon the court" has been construed very narrowly. *See, Williams v. Bd. of Regents,* 90 F.R.D. 140, 142 (M.D. Ga. 1981). The

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[2] Plaintiff may also not seek relief under Rule 60(b)(2) on the basis of "newly discovered evidence" as Plaintiff's motion was filed more than one year after entry of the final judgment. *See, Amstar Corp. v. Envirotech Corp.,* 823 F.2d 1538, 1550 (Fed. Cir. 1987).

principal concern motivating the narrow construction is that the nebulous concept of "fraud upon the court" could overwhelm the specific provision of 60(b)(3) and its time limitations. *See,* 7 *Moore's Federal Practice* § 60.33 at 356 (1991). Thus, "fraud upon the court" has been confined to the most egregious cases where the court or a member is corrupted or influenced or influence is attempted or where the judge has not performed his judicial function. *See, Bulloch v. United States,* 763 F.2d 1115, 1121 (10th Cir.), *cert. denied,* 474 U.S. 1086, 106 S.Ct. 862, 88 L.Ed.2d 900 (1986).

In the instant case, the plaintiff has alleged that the defendant, Gary L. Brooks, committed perjury while testifying during the trial of this case. Perjured testimony obviously interferes with a court's role in discovering the truth. However, the courts have consistently held that perjury of a witness is not sufficient to set aside a judgment for "fraud upon the court." *See, Hazel-Atlas Glass Co.,* 322 U.S. at 245, 64 S.Ct. at 1000, *Bulloch,* 763 F.2d at 1121; *Travelers Indem. Co.,* 761 F.2d at 1551; *Serzysko v. Chase Manhattan Bank,* 461 F.2d 699, 702 (2d Cir.) (per curiam), *cert. denied,* 409 U.S. 883, 93 S.Ct. 173, 34 L.Ed.2d 139 (1972); *Porcelli v. Joseph Schlitz Brewing Co.,* 78 F.R.D. 499, 501 (E.D. Wis.), *aff'd without opinion,* 588 F.2d 838 (7th Cir. 1978). To meet the standard of "fraud upon the court" one needs fraud which generally "involves far more than an injury to a single litigant." It is action which represents "a deliberately planned and carefully executed scheme to defraud" public institutions. *See, Hazel-Atlas Glass Co.,* 322 U.S. at 245-6, 64 S.Ct. at 1000-1001; *Addington v. Farmer's Elevator Mutual Ins. Co.,* 650 F.2d 663, 668 (5th Cir.), *cert. denied,* 454 U.S. 1098, 102 S.Ct. 672, 70 L.Ed.2d 640 (1981). The Court therefore concludes that the alleged perjured testimony of the defendant does not rise to the level of "fraud upon the court" and is not sufficient to set aside the judgment for "fraud upon the court."

Even if the alleged perjured testimony of the defendant would fall within the standard needed under Rule 60(b) to set aside a judgment for "fraud upon the court," the Court finds the judgment should not be vacated. In order to prevail on a motion to vacate a judgment for "fraud upon the court," the plaintiff must show by clear and convincing evidence that there was indeed a "fraud upon the court." *See, Bulloch,* 763 F.2d at 1121. Having carefully and completely examined the transcript of the trial proceedings in this case, the Court is not persuaded nor convinced that the defendant committed perjury as alleged by the plaintiff. The trial transcript does not clearly indicate that the defendant specifically stated that a bank officer named "Ken" threatened to foreclose the mortgage upon the McClure oil and gas lease. The transcript does reveal testimony that the defendant talked with a bank officer named "Ken" and discussed the McClure lease. However, there is no testimony in the transcript that "Ken" specifically told the defendant that the bank was intending to foreclose the mortgage on the McClure lease or that "Ken" made threats that the bank would foreclose the mortgage on the McClure lease. Thus, the Court concludes that the plaintiff has failed to present clear and convincing evidence of a "fraud upon the court."

Finally, the plaintiff has made allegations in his motion that defendant's attorney knew about the alleged perjured testimony and was involved in the presentation of this alleged "fraudulent" testimony. The Court notes that involvement of an attorney in an attempt to suborn perjury has been suggested by some courts as sufficient to constitute "fraud upon the court." *See, Great Coastal Exp., Inc. v. International Broth. of Teamsters, etc.,* 675 F.2d 1349, 1357 (4th Cir.) *cert. denied,* 459 U.S. 1128, 103 S.Ct. 764, 74 L.Ed.2d 978 (1983). However, the Court concludes that the plaintiff, in this case, has failed to present clear and convincing evidence of the defendant's attorney's knowledge and involvement in the presentation of the alleged perjured testimony. Furthermore, the Court

has previously concluded that the plaintiff has failed to present clear and convincing evidence that the defendant committed perjury.

Accordingly, the plaintiff's Motion to Vacate Newly Discovered Evidence of Perjured Testimony of Gary L. Brooks, Defendant, is DENIED.

ENTERED this 17th day of January, 1992.

/s/ Lee R. West
LEE R. WEST
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-88-1504-W

GEORGE L. MOTHERSHED,
Plaintiff,

vs.

CARROLL E. GREGG and GARY L. BROOKS,
Defendants.

JUDGMENT

[Filed Sept. 28, 1989]

This action came on for trial before the Court and a jury, Honorable Lee R. West, District Judge, presiding, and the issues having been duly tried and the Court having rendered its verdict, at the close of Plaintiff's case-in-chief,

It is ORDERED and ADJUDGED that the Plaintiff George L. Mothershed take nothing, that the action be dismissed on the merits, and that Defendants Gary L. Brooks and Carroll E. Gregg recover of the Plaintiff their costs of action.

Dated at Oklahoma City, Oklahoma, this 28th day of September, 1989.

/s/ Lee R. West
LEE R. WEST
United States District Judge
Entered in Judgment Docket
on 9-28-89.

Supreme Court, U.S.
FILED
SEP 3 1993
OFFICE OF THE CLERK

No. 93-175

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

GEORGE L. MOTHERSHED,
Petitioner,

vs.

CARROLL GREGG,

and

GARY L. BROOKS,
Respondents.

Response to Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

No. 93-175

IN THE SUPREME COURT OF THE UNITED STATES

GEORGE L. MOTHERSHED,

Petitioner,

vs.

CARROLL GREGG,

and

GARY L. BROOKS,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This case was originally filed in 1988[1]

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[1]Petitioner first filed an action based upon the events which form a basis for the current action in 1987, case no CIV-87-2361-W. That case was dismissed by the District Court on October 12, 1988 due to Petitioner's conflicting sworn statements regarding his residency, made in order to establish diversity jurisdiction. When the case was dismissed, the District Court found that sanctions should be imposed, pursuant to Rule 11 of the Federal Rules of Civil Procedure, upon Petitioner for those conflicting sworn statements. On October 27, 1988, United States Magistrate, Robin J. Cauthron, imposed sanctions upon Petitioner in the amount of $80,793.65. These sanctions remain unpaid.

and stems from a dispute over an oil and gas lease. Petitioner[2] alleged that Respondent fraudulently induced him to transfer his interest in the lease to Respondent. At trial, the Court entered a directed verdict in favor of Respondent after the presentation of Petitioner's evidence. Judgment was entered in 1989.

In 1991, Petitioner filed a Motion to Vacate the Judgment under Rule 60 of the Federal Rules of Civil Procedure. Petitioner alleged that Respondent had committed fraud in procuring

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Also, in another phase of this litigation, on November 22, 1989, Respondents were granted judgment against Petitioner in the amount of $27,571.75, representing attorney's fees incurred in defending against claims found to have been frivolous. This judgment also remains unpaid.

[2]Throughout this Brief, the parties will be referred to as they appear in this Court. Petitioner, George L. Mothershed, appeared as Plaintiff in the District Court and Appellant in the Tenth Circuit. Respondents, Carroll E. Gregg and Gary L. Brooks, appeared as Defendants at trial and as Appellees in the Tenth Circuit.

the Judgment. Because his motion was more than one year from the date of entry of the Judgment, Petitioner could not use Rule 60(b)(3) as a basis for his Motion, but had to rely upon the "savings" clause in Rule 60(b) which allows a court to "set aside a judgment for fraud upon the court." Fed. R. Civ. P. 60(b). This power of the court can be exercised more than a year after entry of a judgment.

As required, a separate hearing was held by the District Court to determine whether there was fraud committed by Respondent during the original trial in this case. The District Court stated that most courts considering this issue had determined that "perjury of a witness is not sufficient to set aside a judgment for 'fraud on the court'." See, Order of the District Court, attached hereto as Appendix A.[3] The District Court then concluded that

> "the alleged perjured testimony of the defendant

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[3]Hereafter referred to as Appendix "A".

> [Respondent] does not rise to the level of 'fraud upon the court' and is not sufficient to set aside the judgment...."

Id.

Additionally, the District Court stated that, even if the alleged perjury of a witness falls within the scope of Rule 60(b) and can be considered "fraud upon the court," the judgment previously entered should not be vacated. Id. In order to be successful in setting aside a judgment under Rule 60(b), Petitioner "must show by clear and convincing evidence that there was indeed a 'fraud upon the court'." Id. After "carefully and completely" examining the trial transcript, the District Court found that the transcript did not clearly indicate that any perjury occurred. Id. Further, the District Court found insufficient evidence to support Petitioner's allegations that Respondent's counsel knew of, condoned and encouraged the perjury. Id.

Petitioner appealed the District Court's decision to the Tenth Circuit Court of Appeals. After reviewing the appellate record, the briefs of the parties, and the decision of the District Court, the Tenth Circuit agreed that the alleged perjury described by Petitioner "does not rise to the level of a fraud on the court so as to bring his claims within the savings clause of Rule 60(b)." See, Order and Judgment of the Tenth Circuit Court of Appeals, attached hereto as Appendix B.[4] Petitioner now seeks a Writ of Certiorari from this Court in order for this Court to review the decision of the Tenth Circuit.

ARGUMENT

The case presented to this Court is not one for which this Court should issue a Writ of Certiorari. This Court should only review and rule on an issue when it is ripe for review. Petitioner suggests that this Court should review the decision of the Tenth Circuit Court

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[4]Hereafter referred to as Exhibit "B".

of Appeals in this case because the decision creates a conflict with the decisions of other circuits on the issue of whether perjury of a witness constitutes "fraud on the court," as that phrase is used in Rule 60(b) of the Federal Rules of Civil Procedure. Although a conflict between circuits is grounds for this Court to grant a Writ of Certiorari, no such conflict actually exists. Therefore, there is no reason for this Court to address the issue raised by Petitioner and no Writ should be issued.

The decision of the Tenth Circuit does not encompass any holding on the issue of whether perjury constitutes "fraud on the court." Rather, the Tenth Circuit held that the United States District Court properly found that the perjury alleged by Petitioner "does not rise to the level of a fraud on the court so as to bring his claims within the savings clause of Rule 60(b)." Because the decision does not hold that perjury cannot be fraud on the court, it

does not conflict with the law as set forth by any other circuit.

The opinion of the District Court does contain a finding that perjury of a witness does not rise to the level of fraud as required by Rule 60(b) to set aside a judgment without regard to time. However, the District Court went on to find that, even if perjury by a witness does constitute "fraud upon the court," the evidence fell short of establishing that such perjury occurred.

Additionally, the holding in the case relied upon by Petitioner in his argument that a conflict exists between circuit courts as to whether perjury constitutes "fraud upon the court" does not have anything to do with that issue. In Bullock v. United States, 763 F.2d 1115 (10th Cir. 1985), the Tenth Circuit held that the District Court had improperly vacated a judgment because all the information available in the action to set aside the judgment had also been available at trial. Id. at 1121.

On the issue of "fraud upon the court," the Court stated that, although a federal court has the power to set aside a judgment procured through fraud, the fraud must have been "directed to the judicial machinery itself and is not fraud between the parties...or perjury. Id. This was the Tenth Circuit's only reference to perjury as it relates to "fraud upon the court" as used in Rule 60(b). No perjury was alleged to have occurred during trial, nor did the question of whether perjury constitutes fraud on the court play any part in the Court's decision.

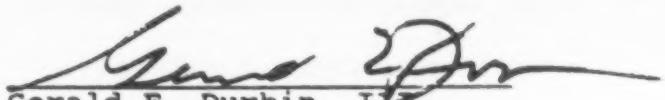
From a review of the Bullock decision, as well as the decisions of the District Court and Tenth Circuit in this case, it is clear that the Tenth Circuit has not specifically held that perjury cannot ever be considered "fraud upon the court" as that phrase is used in Rule 60(b). Because there has been no holding on that issue, there can be no conflict on the issue between the Tenth Circuit and other circuits.

Therefore, there are no grounds for this Court to issue a Writ of Certiorari to review the decision of the Tenth Circuit.

CONCLUSION

It has been said that this Court gives great weight to the fact-finding made by a District Court and which has been approved by a Court of Appeals. National Collegiate Athletic Association v. Board of Regents of University of Oklahoma, 468 U.S. 85 (1984). In this case, the fact-finding made by the District Court was approved by the Tenth Circuit. Petitioner has shown no reason for this Court to issue a Writ of Certiorari in order to review those decisions. No conflict exists between the Tenth Circuit's decision in this case or in Bullock. Therefore, no Writ should issue from this Court.

DURBIN, LARIMORE & BIALICK

By: 

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CERTIFICATE OF MAILING

This is to certify that on this 4 day of Sept, 1993, a true and correct copy of the above and foregoing was mailed, postage prepaid, to the following named counsel of record, to-wit:

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Plaintiff, pro se

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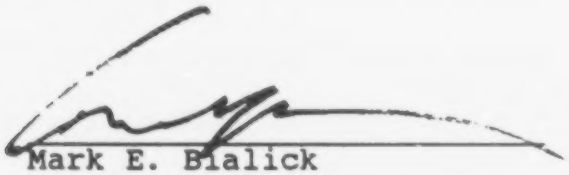

Mark E. Bialick

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Jamie Youngblood

GEORGE L. MOTHERSHED, Plaintiff,	)	
vs.	)	Case No. CIV-88-1504-W
CARROLL E. GREGG and GARY L. BROOKS, Defendants.	)	

ORDER

This matter comes before the Court upon the motion of the plaintiff, George Mothershed, pursuant to Rule 60(b), Fed. R. Civ. P., to vacate the judgment entered herein on September 28, 1989, upon a verdict directed by the Court in favor of the defendants, Carroll E. Gregg and Gary L. Brooks. In his motion, the plaintiff contends that the judgment, affirmed by the Court of Appeals for the Tenth Circuit, was obtained by "fraud upon the court." Specifically, the plaintiff alleges that the defendant, Gary L. Brooks, committed perjury on an issue central to the case. The defendant, Gary L. Brooks, has responded to the plaintiff's motion, and upon consideration of the parties' submissions, the Court makes its determination.[1]

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[1]The defendant, Carroll E. Gregg, has not responded to the plaintiff's motion. The Court, however, declines to deem the motion confessed as to this defendant. As explained infra., the Court concludes that the motion is without merit.

Rule 60(b) sets the forth specific grounds upon which a party may be relieved from operation of a judgment. Rule 60(b)(3) specifically permits a court to relieve a party from a final judgment on the grounds of "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." See, Rule 60(b)(3), Fed. R. Civ. P. However, in order to be relieved from judgment under Rule 60(b)(3), the party must file his motion within one year after entry of the judgment. Id. As previously stated, judgment, in the instant case, was entered in 1989. The plaintiff's motion was not filed until 1991. Consequently, the plaintiff may not seek relief from the final judgment entered in the instant case under Rule 60(b)(3). See, Travelers Indem. Co. v. Gore, 761 F.2d 1549, 1551 (11th Cir. 1985).[2]

Rule 60(b) also recognizes the Court's inherent power to grant relief from a final judgment when fraud has been perpetrated upon it. The savings clause of Rule 60(b) states:

> "This rule does not limit the power of a court . . . to set aside a judgment for fraud upon the court."

Unlike a motion under Rule 60(b)(3), a motion for fraud upon the court under the savings clause is not bound by a one-year limitation for filing. See, 7 Moore's Federal Practice § 60.33 at 355 (1991). In fact, a successful party may be relieved from a

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[2]Plaintiff may also not seek relief under Rule 60(b)(2) on the basis of "newly discovered evidence" as Plaintiff's motion was filed more than one year after entry of the final judgment. See, Amstar Corp. v. Envirotech Corp., 823 F.2d 1538, 1550 (Fed. Cir. 1987).

judgment procured through fraud upon the court even though the movant has been guilty of laches. See, Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944). Because of the absence of a rigid time limitation and the "deep-rooted federal policy preserving the finality of judgments," the concept of "fraud upon the court" has been construed very narrowly. See, Williams v. Bd. of Regents, 90 F.R.D. 140, 142 (M.D. Ga. 1981). The principal concern motivating the narrow construction is that the nebulous concept of "fraud upon the court" could overwhelm the specific provision of 60(b)(3) and its time limitations. See, 7 Moore's Federal Practice § 60.33 at 356 (1991). Thus, "fraud upon the court" has been confined to the most egregious cases where the court or a member is corrupted or influenced or influence is attempted or where the judge has not performed his judicial function. See, Bulloch v. United States, 763 F.2d 1115, 1121 (10th Cir.), cert. denied, 474 U.S. 1086, 106 S.Ct. 862, 88 L.Ed.2d 900 (1986).

In the instant case, the plaintiff has alleged that the defendant, Gary L. Brooks, committed perjury while testifying during the trial of this case. Perjured testimony obviously interferes with a court's role in discovering the truth. However, the courts have consistently held that perjury of a witness is not sufficient to set aside a judgment for "fraud upon the court." See, Hazel-Atlas Glass Co., 322 U.S. at 245, 64 S.Ct. at 1000, Bulloch, 763 F.2d at 1121; Travelers Indem. Co., 761 F.2d at 1551; Serzysko v. Chase Manhattan Bank, 461 F.2d 699, 702 (2d Cir.) (per

curiam), cert. denied, 409 U.S. 883, 93 S.Ct. 173, 34 L.Ed.2d 139 (1972); Porcelli v. Joseph Schlitz Brewing Co., 78 F.R.D. 499, 501 (E.D. Wis.), aff'd without opinion, 588 F.2d 838 (7th Cir. 1978). To meet the standard of "fraud upon the court" one needs fraud which generally "involves far more than an injury to a single litigant." It is action which represents "a deliberately planned and carefully executed scheme to defraud" public institutions. See, Hazel-Atlas Glass Co., 322 U.S. at 245-6, 64 S.Ct. at 1000-1001; Addington v. Farmer's Elevator Mutual Ins. Co., 650 F.2d 663, 668 (5th Cir.), cert. denied, 454 U.S. 1098, 102 S.Ct. 672, 70 L.Ed.2d 640 (1981). The Court therefore concludes that the alleged perjured testimony of the defendant does not rise to the level of "fraud upon the court" and is not sufficient to set aside the judgment for "fraud upon the court."

Even if the alleged perjured testimony of the defendant would fall within the standard needed under Rule 60(b) to set aside a judgment for "fraud upon the court," the Court finds the judgment should not be vacated. In order to prevail on a motion to vacate a judgment for "fraud upon the court," the plaintiff must show by clear and convincing evidence that there was indeed a "fraud upon the court." See, Bulloch, 763 F.2d at 1121. Having carefully and completely examined the transcript of the trial proceedings in this case, the Court is not persuaded nor convinced that the defendant committed perjury as alleged by the plaintiff. The trial transcript does not clearly indicate that the defendant specifically stated that a bank officer named "Ken" threatened to

foreclose the mortgage upon the McClure oil and gas lease. The transcript does reveal testimony that the defendant talked with a bank officer named "Ken" and discussed the McClure lease. However, there is no testimony in the transcript that "Ken" specifically told the defendant that the bank was intending to foreclose the mortgage on the McClure lease or that "Ken" made threats that the bank would foreclose the mortgage on the McClure lease. Thus, the Court concludes that the plaintiff has failed to present clear and convincing evidence of a "fraud upon the court."

Finally, the plaintiff has made allegations in his motion that defendant's attorney knew about the alleged perjured testimony and was involved in the presentation of this alleged "fraudulent" testimony. The Court notes that involvement of an attorney in an attempt to suborn perjury has been suggested by some courts as sufficient to constitute "fraud upon the court." See, Great Coastal Exp., Inc. v. International Broth. of Teamsters, etc., 675 F.2d 1349, 1357 (4th Cir.) cert. denied, 459 U.S. 1128, 103 S.Ct. 764, 74 L.Ed.2d 978 (1983). However, the Court concludes that the plaintiff, in this case, has failed to present clear and convincing evidence of the defendant's attorney's knowledge and involvement in the presentation of the alleged perjured testimony. Furthermore, the Court has previously concluded that the plaintiff has failed to present clear and convincing evidence that the defendant committed perjury.

Accordingly, the plaintiff's Motion to Vacate Newly Discovered Evidence of Perjured Testimony of Gary L. Brooks, Defendant, is DENIED.

ENTERED this 17th day of January, 1992.

LEE R. WEST
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FILED
United States Court of Appeals
Tenth Circuit

FOR THE TENTH CIRCUIT

MAY 11 1993

ROBERT L. HOECKER
Clerk

FILED
MAY 13 1993

GEORGE L. MOTHERSHED,

Plaintiff-Appellant,

v.

CARROLL E. GREGG, GARY L. BROOKS,

Defendants-Appellees.

No. 92-6035
(D.C. No. CIV-88-1504-W)
(W.D. Okla.)

DOCKETED

ORDER AND JUDGMENT*

Before MOORE and BRORBY, Circuit Judges, and VAN BEBBER,** District Judge.

**Honorable G. Thomas Van Bebber, District Judge, United States District Court for the District of Kansas, sitting by designation.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff George L. Mothershed appeals from the district court's denial of his motion to vacate judgment, filed pursuant to

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

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Fed. R. Civ. P. 60(b). The judgment in question was entered on September 28, 1989, following the district court's grant of a directed verdict in defendants' favor. This court affirmed the judgment on appeal. See Mothershed v. Southwestern Bank & Trust Co., Nos. 89-6144, 89-6314 (10th Cir. Jan. 30, 1991)(unpublished decision).

Mr. Mothershed maintains the district court abused its discretion in denying his motion. See Campbell v. Bartlett, 975 F.2d 1569, 1580 n.15 (10th Cir. 1992)(this court normally reviews denial of Rule 60(b) motion for abuse of discretion). He contends that Mr. Gregg committed perjury during the civil trial which lead to the 1989 judgment. He asserts the perjury was so egregious that it requires the judgment be vacated. Defendant Gregg contends that this appeal is frivolous, and that sanctions are appropriate under Fed. R. App. P. 38.

We have carefully reviewed the record on appeal, as well as the parties' briefs and the district court's order. We agree with the district court that the perjury which Mr. Mothershed has described does not rise to the level of a fraud on the court so as to bring his claims within the savings clause of Rule 60(b). See Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 245 (1944); Bulloch v. United States, 763 F.2d 1115, 1121 (10th Cir. 1985), cert. denied, 474 U.S. 1086 (1986). Consequently, for the reasons stated in the district court's order, the judgment is affirmed.

This leads us to the issue of Mr. Gregg's request for sanctions. Fed. R. App. P. 38 authorizes this court to award

damages if we determine that an appeal is frivolous or brought for the purpose of delay. Braley v. Campbell, 832 F.2d 1504, 1510 (10th Cir. 1987). An appeal is frivolous when "'the result is obvious, or the appellant's arguments of error are wholly without merit.'" Id. (quoting Taylor v. Sentry Life Ins. Co., 729 F.2d 652, 656 (9th Cir. 1984)(citation omitted)).

At the time Mr. Mothershed filed this appeal, it was absolutely clear that the perjury which he describes, even if true, would not constitute fraud on the court as that term has been judicially interpreted. See Hazel, 322 U.S. at 245-46; Bulloch, 763 F.2d at 1121; see also Great Coastal Express, Inc. v. International Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers, 675 F.2d 1349, 1356 (4th Cir. 1982)(courts agree that fraud on the court should be construed very narrowly when applied, as here, under the savings clause of Rule 60), cert. denied, 459 U.S. 1128 (1983). Minimal legal research makes that abundantly clear.

In addition, Mr. Mothershed has not cited any authority which stands for the proposition that he, as a nonprevailing party to the judgment, was entitled to an evidentiary hearing in the district court prior to the court's consideration of the Rule 60 motion. Finally, there is nothing in the record to show the district court abused its discretion in staying discovery. It is apparent Mr. Mothershed simply wants to relitigate the issues decided in the 1989 lawsuit. Under these circumstances, allowing him to do so would severely undermine the integrity of the final judgment rule. See Bulloch, 763 F.2d at 1121 (unless party shows

fraud on the court through clear and convincing evidence, judgment should not be disturbed).

We agree with Mr. Gregg that sanctions pursuant to Fed. R. App. P. 38 are appropriate. We award as just damages the sum of $1,500 plus single costs. Mr. Mothershed shall make payment within sixty days of the date of this order and judgment. Mr. Mothershed's motion to correct his brief is GRANTED. His motion to expedite this appeal and his application for writ of Ne Exeat are DENIED as moot. The judgment of the United States District Court for the Western District of Oklahoma is AFFIRMED.

The mandate shall issue forthwith.

Entered for the Court

Wade Brorby
Circuit Judge